

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ANDREW M. REID	:	DETERMINATION
	:	DTA NO. 811009
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for	:	
the Years 1986 and 1987.	:	

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Petitioner, Andrew M. Reid, One Partridge Hollow Road, Greenwich, Connecticut 06897, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1986 and 1987.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on February 16, 1994 at 9:15 A.M. and continued to conclusion on February 17, 1994 at 9:15 A.M., with all briefs to be submitted by June 27, 1994. Petitioner, appearing by Townsend & Valente, Esqs. (R. Edward Townsend, Jr., Esq., of counsel), submitted a brief on May 2, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Craig Gallagher, Esq., of counsel), submitted its brief on May 27, 1994. Petitioner submitted a reply brief on June 27, 1994.

ISSUES

I. Whether petitioner was a domiciliary of New York State and New York City for the years 1986 and 1987 or whether he was a statutory resident of the City and State of New York during those years.

II. Whether there is reasonable cause to waive the penalties.

FINDINGS OF FACT

Petitioner, Andrew M. Reid, was born in White Plains, New York and grew up in Harrison, New York. His parents moved to Greenwich, Connecticut in 1968-69, and have resided there since that time. Petitioner attended college at the University of Arizona in Tucson, Arizona, and graduated in 1972. He lived with his parents in Greenwich, Connecticut, when he would come home from college during semester breaks and summers, and also for two or three months after he graduated from college (tr., pp. 19, 23-24).

Petitioner has three sisters, one of whom, Addie R. Powell, has resided in New Canaan, Connecticut for over 20 years. One of his other sisters resides in Pittsburgh, Pennsylvania, while the remaining sister resides in California (tr., pp. 19-21).

Petitioner was close to his family. Birthdays as well as major holidays were celebrated with his parents. During the hearing, petitioner testified that his entire family went on a safari together in 1990 to celebrate his parents' 70th birthdays, and they also went to Egypt to celebrate his parents' 50th wedding anniversary in 1992. A family trip to the Far East is planned to celebrate petitioner's father's 75th birthday (tr., pp. 20-22).

In the fall of 1972, petitioner took a job in New York City as a sales trainee for Garland, a Brockton, Massachusetts-based manufacturer of ladies' apparel. A year later, he was employed in New York City by Marshall Ray, a producer of men's clothing based in Troy, New York (tr., p. 24).

In 1975, petitioner started his own business, along with John Pollack and William Mendel. Andy Johns Fashions, Inc. ("the company") was incorporated in New York State on July 23, 1975 and opened its doors on August 1, 1975 (tr., pp. 40-41). The company's business was the production and sale of women's outerwear, and it initially had offices at 1410 Broadway, New York City (tr., pp. 26-27).

Petitioner was the president of the company; his primary duties were to create, design and merchandise the company's line of clothing, and generally to handle the sales and "front end" of the business. John Pollack was vice president, secretary and treasurer and his primary duties were production and shipping, accounts receivable and payable and bookkeeping -- the

"back end" of the business (tr., pp. 27-28).

During the hearing, petitioner testified that he and John Pollack worked seven days a week for about the first three years to get the company off the ground (tr., pp. 29-30). The company's customers were department stores throughout the country and petitioner attempted to sell to every major store in every major city in the United States. Accordingly, petitioner travelled on the average of two or three days a week to visit as many customers as he could, to show the company's line and get it sold (tr., pp. 28-30, 36). When travelling, petitioner shopped the stores to see what the company's competitors were doing, and he periodically travelled to Europe for the same purpose and to research designs and trends (tr., pp. 33, 38).

In 1977, the company rented warehouse space in Patterson, New Jersey because the New York City local contract shipping facility was becoming too expensive. In addition, John Pollack lived in New Jersey. All of the "back end" activities of the business were handled by Mr. Pollack in New Jersey. Petitioner had an office in New Jersey and testified that he was there at least once a week, sometimes twice a week, depending on "what was going on" (tr., pp. 37-38).

At some point, the company was reincorporated under the laws of the State of New Jersey. Petitioner testified that the corporate offices were located in New Jersey (tr., p. 41).

The company had a sales office and an area for some of the design work in New York. In addition, petitioner had an office in New York (tr., pp. 41-42).

At first, the company's manufacturing was done by New York metropolitan area contractors (tr., p. 42). However, after the first year, it started to manufacture garments in Kentucky. After the second year, most of the manufacturing took place abroad, mainly in the Far East (tr., p. 43).

The warehouse remained located in Patterson, New Jersey for about five years (tr., pp. 43-44). Ultimately, all the company's warehousing was centralized in Kentucky (tr., p. 44).

Petitioner testified that he travelled to Kentucky "quite a few times during a year" to inspect the garments and oversee production (tr., pp. 44-45).

Prior to 1980, petitioner and the other principals of the company started a manufacturing business in Kentucky and became 50% owners of that business, which they still own. Petitioner continues to travel to Kentucky (tr., p. 45-46).

Petitioner testified that he lived with his parents in Greenwich, Connecticut for two to three months when he started working in New York City; however, by the end of 1972, he had rented an apartment located at 41 East 11th Street, New York City. This apartment was rented by petitioner and petitioner's father's partner's son for two years (tr., pp. 25, 262). At the end of the two-year lease, petitioner moved to East 83rd Street, where he lived for about three to three and a half years (tr., p. 263). Petitioner moved to 1175 York Avenue ("York Avenue") "around 1978" (tr., p. 264).

The York Avenue building in which petitioner's apartment was located had a lobby, elevator service and a doorman. His apartment was located on the eighth floor of the building and faced a back courtyard. It contained three and a half rooms and was approximately 700 square feet. Petitioner described it as a "standard one bedroom" (tr., pp. 57, 95).

In January 1981, petitioner began looking for a place outside of New York City to purchase. He considered a large house in the Hamptons, which would be divided into shares, and the shares rented out, but he decided that he did not want to buy property with friends, and that "after living in New York for a while, [he] missed having a home and being in one and wanted to not be in New York" (tr., p. 47).

Petitioner then spoke with his father, and contacted several real estate people and began looking in Connecticut to buy a home. He was looking for one which, in terms of commuting, would be only one to one and a half hours outside of New York City, and which he could afford. He spent the next eight or nine weekends looking with a real estate agent. Ultimately, he found a house which he could afford and which was within a reasonable commuting distance from New York. Petitioner testified that he knew he had found the house, in March 1981, when he drove down the driveway and it felt "like home" (tr., pp. 48-49).

On April 10, 1981, petitioner purchased a home in Wilton, Connecticut located at

28 Chicken Street ("Chicken Street"). Petitioner purchased the Chicken Street property for \$218,500.00; he financed the purchase in part by taking out a \$125,000.00 mortgage with People's Savings Bank of Bridgeport, Connecticut<sup>1</sup> (tr., pp. 50-52; Petitioner's Exhibit "1"). The People's Savings Bank mortgage statements were addressed to petitioner at the Chicken Street address<sup>2</sup> (tr., p. 52; Petitioner's Exhibit "2"). The Chicken Street address is reflected on petitioner's refinanced mortgage with People's Savings Bank in June 1983 (tr., p. 71; Petitioner's Exhibit "5"). He also used this address in August 1987 when he set up a commercial collateral note with Dollar Dry Dock Savings Bank secured by a first mortgage on the Chicken Street property (tr., p. 72; Petitioner's Exhibit "6").<sup>3</sup>

The Chicken Street property consisted of about two acres which was "basically a wooded piece of property." The driveway was a quarter of a mile long and there were lawns on either side of the house. About one hundred-year-old stone fences were situated on the property as well. The house contained approximately 3,500 to 3,800 square feet, with expansive windows and sliding glass doors, upstairs and downstairs fireplaces, a garage, a deck and various other amenities. Petitioner described the house as an "A-frame house with cathedral ceiling" (tr., p. 55). The house had forced hot water oil heat and was not air conditioned (tr., p. 60).

Petitioner made numerous improvements to the Chicken Street property. He doubled the size of the deck to about 20 feet wide and 40 feet long -- "[i]t ran the length of the house."

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<sup>1</sup>A copy of the deed and mortgage settlement statement was submitted as Petitioner's Exhibit "1".

<sup>2</sup>A copy of a People's Savings Bank mortgage statement was submitted as Petitioner's Exhibit "2".

<sup>3</sup>The People's Savings Bank mortgage note dated June 3, 1983 was submitted as Petitioner's Exhibit "5". The Dollar Dry Dock commercial collateral note dated August 19, 1987 was submitted as Petitioner's Exhibit "6".

He testified that the enlarged deck was approximately the size of his York Avenue apartment (tr., p. 58). He installed a security system (tr., p. 62). He also carpeted the downstairs and had shelves built for what he called the play room (tr., pp. 58, 63). He remodeled the master bathroom. He also had an oak floor put down in the living room and dining area (tr., p. 60). In addition, the property needed relandscaping near the house. He testified that he spent about \$25,000.00 to \$30,000.00 improving and remodeling the house (tr., p. 61).

Petitioner spent approximately \$50,000.00 to \$60,000.00 on furnishings for the Chicken Street property (tr., p. 61). Among his purchases was a front projection 50" screen television which he installed in the playroom. This room also contained his collection of liquor bottles. Petitioner also acquired a collection of chicken items and paraphernalia which he had received as housewarming gifts from friends (tr., pp. 58-59).

Shortly after closing on the Chicken Street property, petitioner moved what he termed his personal belongings -- his clothes, books and tapes; his toiletries; kitchen items and food stuffs -- to the Chicken Street property. Petitioner paid a professional moving company \$833.00 for four men working seven hours (tr., pp. 74-75).

Petitioner left the following items in the York Avenue apartment: a bed; a small dresser in the bedroom; a sofa; a little settee; a small kitchen table with two chairs; and a television set (tr., p. 74). When asked why he left furniture in the apartment, petitioner testified that "nothing was going to fit in terms of what I was moving towards. It was old furniture and I wasn't going to use it". He also testified that he was still renting the York Avenue apartment and he could stay there when he wanted or needed to because there was a bed there (tr., p. 74).

Petitioner testified he registered to vote in Connecticut in 1981 and had voted regularly in Connecticut since that time (tr., pp. 147-148). As his Exhibit "22", petitioner submitted a letter from George F. Lenz, Registrar of Voters for the Town of Wilton, Connecticut. Mr. Lenz certifies that petitioner was a "registered voter in the Town of Wilton in 1986 and 1987. In those years, he was a resident at 28 Chicken Street of this Town."

Petitioner submitted his 1981 Form W-2's from A. J. Imports, Inc. and Andy Johns

Fashions, and the first page of (1) his 1981 Federal Form 1040, (2) his 1981 New York State IT-203, and (3) his 1981 State of Connecticut Capital Gains and Dividends Tax Return as his Exhibit "23". Each of these documents contained the 28 Chicken Street, Wilton, Connecticut address.

Petitioner testified, on cross-examination, that he considered himself a New York resident up until he purchased the Chicken Street home. When asked by the Division of Taxation's ("Division") representative when he last filed a New York City tax return as a resident, petitioner testified that it was "probably through 1980" (tr., pp. 263-265).

During the hearing, the Division submitted as its Exhibit "J" the original audit log and pertinent portions of the audit file. One of the documents in Exhibit "J" is the "Master Tax Index Multi Year Search", which identifies the years and types of New York State income tax returns filed by petitioner. According to this document, petitioner did not file any tax return for the years 1973 through 1975 and filed a Form IT-203, a nonresident return, for the years 1976 through 1984.<sup>4</sup>

Petitioner testified that since 1981 he has filed a nonresident New York State income tax return and a resident Connecticut income tax return (tr., p. 151).

At some point, petitioner obtained a Connecticut driver's license and continues to have one. Petitioner submitted a copy of his Connecticut driver's license, which expired on April 25, 1992, as his Exhibit "24". He testified that he threw the previous driver's licenses out when he obtained a new one (tr., pp. 151-152).

Although petitioner did not join a Connecticut temple in 1981, "once or twice a year during the high holidays" he would attend temple in Georgetown, Connecticut (tr., pp. 153-154). In 1992, petitioner and his wife joined the Greenwich Reform Synagogue in Greenwich, Connecticut.

In 1981, petitioner opened bank accounts with People's Savings Bank, a Connecticut

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<sup>4</sup>1984 was the last year asked for in this multi-year search.

bank<sup>5</sup> (tr., p. 156; Petitioner's Exhibit "27").

Petitioner had his safe deposit box at the Manufacturers Hanover Trust Company branch near his office (tr., p. 162). His Visa and Mastercard were also issued by Manufacturers Hanover Trust Company. The billing addresses for the safe deposit box, Visa and Mastercard were all changed to the

Chicken Street address<sup>6</sup> (tr., pp. 161-162; Petitioner's Exhibit "28"). Petitioner had his Manufacturers Hanover Trust Company bank statements changed to the Chicken Street address.

Petitioner continued to use various New York health care providers; however, subsequent to his purchase of the Chicken Street property, his doctors sent their bills to the Connecticut address. Petitioner used the Chicken Street address when he made claims on his medical insurance. Also, when petitioner was taken to the emergency room at Mt. Sinai Hospital on February 25, 1983, he used his Connecticut address (tr., pp. 199-205; Petitioner's Exhibits "55" and "56").<sup>7</sup>

As a stockholder and the president of the company and its affiliates, petitioner had to sign various agreements and legal documents, and in all of the documents submitted into evidence during the hearing, petitioner's address for notice and all other purposes is indicated to be 28 Chicken Street, Wilton, Connecticut. The agreements and documents which reflect this

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<sup>5</sup>As part of petitioner's Exhibit "27", he submitted photocopies of two People's Savings Bank Plus Cards -- one was for a special savings account and the other for a savings account.

<sup>6</sup>As his Exhibit "28", petitioner submitted the Manufacturers Hanover Trust notice which accompanied the Visa card valid for the period 10/82 through 9/83; the Visa statement for 5/4/84; the Mastercard statement for 5/4/84; and the Manufacturers Hanover Trust Company Safe Deposit Department receipt dated 6/9/86.

<sup>7</sup>Petitioner submitted insurance claim forms, doctor bills and checks as his Exhibit "55". The emergency room chart from Mt. Sinai Hospital dated 2/25/83 was submitted as Petitioner's Exhibit "56".



range in date from October 31, 1982 through June 12, 1989 and were submitted as follows:

(a) Stock Purchase Agreement dated October 31, 1982 among Andy Johns Fashions, Inc., A. J. Imports, Inc., William Mendl, petitioner and John Pollack (Petitioner's Exhibit "30");

(b) Stockholders' Agreement dated February [blank], 1983 among petitioner, John Pollack and Andy Johns Fashions, Inc. (Petitioner's Exhibit "31");

(c) Stockholders' Agreement made January 1, 1984 among petitioner, John Pollack and Andy Johns Fashions, Inc. (Petitioner's Exhibit "32");

(d) Discussion draft of Stock Purchase Agreement dated July [blank], 1984 among an unnamed holding company, John Pollack, petitioner and William Mendl (Petitioner's Exhibit "33");

(e) Stock Purchase Agreement dated January 1, 1985 between petitioner and Lee Lipton (Petitioner's Exhibit "34");

(f) Stockholders' Agreement dated February 1, 1985 among petitioner, John Pollack and A. J. Imports, Inc. (Petitioner's Exhibit "35");

(g) Stock Purchase Agreement dated March 1, 1985 between petitioner and Lee Lipton (Petitioner's Exhibit "36");

(h) Stock Purchase Agreement dated May 6, 1986 among XCOR International, Inc., petitioner, John Pollack, Lee Lipton and Lewis Berman (Petitioner's Exhibit "37");

(i) Employment Agreement dated May 30, 1986 between Andy Johns Fashions, Inc. and petitioner (Petitioner's Exhibit "38");

(j) Discussion draft dated November 3, 1987 of Stock Restriction and Purchase Agreement among Phar Shar Manufacturing Company, Inc. and William Mendl, Osco Pharris, John Pollack and petitioner (Petitioner's Exhibit "39");

(k) Letter dated August 20, 1987 from Cynthia L. Stewart of the law firm Brown, Todd and Heyburn to petitioner, among others, with respect to Shareholders' Agreement

(Petitioner's Exhibit "40"); and

(l) Letter dated June 12, 1989 from Ms. Stewart to petitioner enclosing the executed Stock Restriction and Purchase Agreement (Petitioner's Exhibit "41").

Petitioner, when purchasing life insurance, used his Connecticut address on the application, and the policies were issued to petitioner at this address. He received the premium notices for various life insurance policies at his Chicken Street address (tr., pp. 181-186).

Petitioner made investments which reflected the Chicken Street address. These included an I.R.A. opened in 1982 at Manufacturers Hanover Trust Company (Petitioner's Exhibit "49"); an investment in Advanced Separations Technologies, Inc. on or about July 12, 1983 (Petitioner's Exhibits "50" and "51"); an I.R.A. at Dollar Dry Dock dated April 5, 1984 (Petitioner's Exhibit "52"); and an investment in Walker Energy Partners, an oil and gas limited partnership, made in 1985 (Petitioner's Exhibit "53") (tr., pp. 192-197).

On July 15, 1987, petitioner's mother reregistered stock in Russ Togs, Inc., a gift which she had made to petitioner under the Uniform Gifts to Minors Act, to reflect his Chicken Street address (tr., pp. 197-199).

After 1987, petitioner's business continued to require him to be in New York City "about the same as before." He continued to be in New York City two to three days a week, and he went to New Jersey one day per week, sometimes two. He continued to travel to the stores.

The Chicken Street property was just under 50 miles from his New York City office (tr., p. 290). The commute took about 1 hour 15 minutes to 1 hour 20 minutes (tr., p. 80).

Petitioner testified that the company supplied him with a car, which it also maintained for him (tr., pp. 79-80). Petitioner's Exhibit "9" is a letter from Jeff Marcus, vice president and controller of Andy Johns Fashions, which stated company policy concerning reimbursement of business-related expenses. Mr. Marcus states:

"[I]t was the policy in 1986 & 1987 of Andy Johns Fashions, Mr. Reid's employer, to reimburse him for all of his out of pocket business related expenses. This included, but was not limited to, entertainment, lunches, travel and automobile gasoline expenses.

"Mr. Reid was reimbursed for such expenses upon presentation and

subsequent approval of business related expense reports."

Petitioner testified he would drive into New York City or New Jersey. However, he sometimes got rides with neighbors. In late 1985, petitioner began commuting on a regular basis with a friend, Peter Mazza. Both petitioner and Mr. Mazza testified that generally they would drive into New York City together on Mondays and another day of the week. Mr. Mazza testified that he and petitioner always took his car, which he drove when they rode together. This pattern of commuting two days per week was consistent through all of 1986 and through the first half of 1987. During the latter half of 1987, petitioner rode with Mr. Mazza approximately once a week. Mr. Mazza's business had been sold in early 1987, and the arrangements he had for an office in New York City for the first six months thereafter had terminated. Accordingly, Mr. Mazza established an office in Connecticut and was driving to New York City less frequently (tr., pp. 86-88, 247-249).

Petitioner testified he did not have a monthly parking space in New York City because "the company never was going to reimburse [him] for it so [he] paid as [he] went." In addition, he testified that he believed he saved money "by not taking out a monthly space" because there were days he was in New Jersey or was travelling (tr., pp. 80-81).

Petitioner testified that he did not save parking bills or toll receipts for his commute (tr., p. 289).

Petitioner continued to rent the York Avenue apartment after 1981. In the fall of 1984, petitioner began to dispose of the furniture in the apartment because he was considering subleasing it (tr., pp. 113-114). According to an affidavit (Petitioner's Exhibit "17") submitted by petitioner's sister, Addie Reid Powell, petitioner gave her "one sofa, one loveseat and one queen size bed."

Petitioner did not sublet the apartment because he discovered he would have forfeited his right to purchase the apartment at an insider's price when the building went co-op (tr., pp. 113-114). Petitioner went out and purchased some inexpensive furniture for it because he "had people asking if they could use [it]" (tr., pp. 116-118).

Petitioner testified that he continued to rent the York Avenue apartment because "there was conversation that the building was going to go co-op" (tr., p. 95). He expected to purchase the apartment and double his money upon selling it (tr., pp. 96-97). In 1984, an offering plan was first circulated. At that time, a tenants' association was formed, it hired counsel, and the tenants' association began negotiations with the sponsor. In 1986, the sponsor suddenly died and the co-oping process came to halt. The sponsor's estate ultimately sold the building to a new group of investors, which started the co-oping process all over again. A new tenants' association was formed, negotiations took place with the new sponsor and the building went co-op. Petitioner purchased the York Avenue apartment for \$134,000.00 on June 27, 1989 (tr., pp. 98-103).

In 1989, petitioner testified that he made no effort to sell the apartment because "[t]he recession was in." However, he leased the apartment to his partner, Lee Lipton's, parents for two years. When this lease expired, he allowed his tenants to continue as month-to-month tenants while he tried to sell the apartment. In June 1993, approximately a year and a half after first placing it on the market, he took the first offer he received and sold the apartment at a loss for \$110,000 (tr., pp. 103-107).

Petitioner testified that subsequent to his move to Connecticut he rarely used the York Avenue apartment. His estimate was that in the first few years he used it approximately two to three days per month and thereafter two to three times per year (tr., p. 107). Petitioner allowed friends and business associates to use the apartment frequently.

Petitioner testified that he had given a key to the York Avenue apartment to several people including "his girlfriend at the time, Laura" (tr., p. 110). He stated that she would lend the key to her girlfriends and they would usually leave it downstairs with the doorman. He also stated that there was never any problem getting someone a key and that there were four or five keys around (tr., pp. 110-111). Petitioner did not charge his friends for the use of the apartment (tr., p. 108).

Petitioner maintained a telephone in the York Avenue apartment. He allowed his guests

to use the telephone. He did not ask them to reimburse him for their use of the telephone (tr., p. 109).

Petitioner continued to receive mail at his York Avenue apartment after his move to Connecticut. The utility and telephone bills for the apartment were sent there, as well as all bills related to the apartment including the rent bill. He testified he did this to show a presence at the apartment because he did not want to jeopardize his right to buy the apartment at an insider price (tr., pp. 210-211). Petitioner also maintained cable service for the apartment, which was billed to the York Avenue address.

Petitioner testified he received his American Express bill at the York Avenue apartment because he "always needed to make sure that [he] got it and had it and it was the one bill that always had to be paid promptly and [he] always had to take care of it as soon as [he] got it" (tr., pp. 211-212). Petitioner testified that his Wilton, Connecticut mailbox was occasionally damaged and his mail was strewn on the ground (tr., pp. 212-214). Petitioner also received mail concerning investments he had made in the 1970's at the York Avenue address (tr., pp. 215-218).

Petitioner testified that he went to the apartment once or twice a week "to make sure the doorman knew [he] was there." He would pick up his mail during those visits (tr., pp. 284-285).

At some point, petitioner opened a bank account with Manufacturers Hanover Trust Company which reflected the York Avenue address (tr., pp. 293-249). The statements were sent to petitioner at the York Avenue address during the relevant period.

Petitioner testified that he rarely went into New York after being in New Jersey. He testified he would do so only if he had an appointment or something to do in the City. "You would occasionally make dinner plans with key buyers and spend time talking to merchandise managers" (tr., pp. 135-136).

In 1983 or 1984, the company hired two additional individuals, Lee Lipton and Lou Berman, to assist petitioner and Mr. Pollack in the "front end" and "back end" of the business,

respectively. Mr. Lipton and Mr. Berman were made partners in March 1985. As a result, petitioner's responsibilities changed and he spent less time visiting specific stores and more time engaged in strategic planning with John Pollack in New Jersey. Petitioner continued to spend usually one or two days a week in New Jersey (tr., pp. 124-126).

Petitioner testified that he had been dating a radiologist, Penny Lustij, for about four or five years prior to the audit period. Dr. Lustij was doing her residency at Queens General in Queens, New York. According to petitioner, Dr. Lustij spent weekends with him in Connecticut. It also appears from the record that Dr. Lustij lived with petitioner during part of 1986 (tr., pp. 298-299). Dr. Lustij would drive her own car to Connecticut. Petitioner stated that during 1986 and 1987 their relationship was winding down and finally terminated during this period (tr., pp. 137-138).

Petitioner immediately began dating Laura Black, a buyer for Woodward and Lowthrop, whom he had met in Washington, D.C. Ms. Black had moved to New York and petitioner testified "[w]e became friends and in '86, '87 we were dating and in 1988 she and I got married" (tr., p. 138). Petitioner testified he began taking Ms. Black to Connecticut (tr., pp. 138-139).

In late 1985, petitioner's father prevailed upon petitioner to purchase his father's cooperative apartment located at 14 East 75th Street, New York City ("East 75th Street") from his mother, in whose name title was held. Petitioner, wanting to assist his father with his retirement plans, convinced himself that this would be a good investment in view of what was happening with real estate values at the time, and that if he fixed it up, he could sell it at a substantial profit (tr., pp. 218-226). Petitioner purchased the apartment on January 10, 1986 for \$875,000.00 (tr., pp. 224-225).

The East 75th Street apartment was a duplex which contained approximately 2,500 square feet. It was located on the second floor and had a living room, dining area, kitchen, laundry/maid-type area, two bedrooms and three bathrooms (tr., pp. 277-278).

Petitioner testified that his parents moved everything out of the apartment and disconnected the telephone when they sold the apartment to him. Through 1986, there was no

furniture in the apartment, and although it was vacant, it was habitable. Throughout 1986, petitioner paid the maintenance on the apartment. In late 1986, he hired an architect to draw up plans to renovate the apartment. According to petitioner, "the plans took two, three, four months" (tr., p. 227). The renovations began in "February, March of 1987" and were completed at the end of 1987. Petitioner did install a telephone in 1987 for use by the construction crew. During the period of the renovation, the apartment was uninhabitable (tr., pp. 227-231). The renovations cost petitioner in excess of \$300,000.00 (tr., p. 279).

Petitioner testified that neither he nor anyone ever spent a single night during 1986 or 1987 at the East 75th Street apartment. After the property was renovated, petitioner did not try to sell it (tr., pp. 230-231). Petitioner continues to own this property and use it.

Petitioner maintained a bank account with Manufacturers Hanover Trust Company which reflected the East 75th Street address. The bank statements for that account, as well as utility and maintenance charge bills, were all addressed to the East 75th Street apartment (tr., pp. 280-281, 293-294).

Petitioner testified that he received some personal mail at his New York City business address. He explained that he gave people his business card and they would have sent him mail there (tr., pp. 286-287).

Petitioner had a membership in a New York City tennis club in 1986 or 1987; he was unsure of the exact date. He testified that the tennis club was near his office and he was going to use it for social business (tr., p. 292).

In 1986, the sales of the company were over \$10,000,000.00 and it had 800 or 900 accounts (tr., pp. 121, 123).

The company was sold on May 31, 1986 to XCOR International, Inc. ("XCOR") (tr., pp. 127-128). In connection with the sale of the company to XCOR, petitioner received a five-year employment contract and remained president of the company. His responsibilities became more corporate than entrepreneurial, since the purchaser was a public company based in Florida (tr., pp. 131-132). Subsequent to the sale of the company, petitioner's work week continued about

the same -- two or three days in New York, including most Mondays; one or two days a week in New Jersey, usually a Thursday and/or Friday; and the remaining days travelling (tr., pp. 134-136).

Petitioner timely filed New York State nonresident income tax returns (Form IT-203 with attachments) for 1986 and 1987.<sup>8</sup>

Petitioner's mailing address was listed as 28 Chicken Street, Wilton, Connecticut. Form NYC-203, New York City Nonresident Earnings Tax Return attached to Form IT-203, set forth the allocation schedule for days spent in and out of New York City. With respect to petitioner's presence in New York in 1986, of 365 days 231 were working days, 176 were days worked in New York City and on 55 days petitioner conducted business outside the City. Form NYC-203 answered in the negative the question, "Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year?"

The 1987 Form IT-203 filed by petitioner reflected the same address and answered the same question in the negative. The 1987 Form NYC-203 reflected 231 working days out of 365 in 1987 and of that number 178 were days where work was performed in New York City.

A field audit was conducted of petitioner's 1986 and 1987 tax returns. An auditor requested petitioner to fill out an "audit questionnaire". Petitioner submitted a written response to the questionnaire, dated October 20, 1989, in which he stated he was an executive, a "principal -- employee", employed full time by Andy Johns Fashions, Inc., 512 Seventh Avenue, New York, New York. He stated that he was physically present in New York State for work purposes 176 days in 1986 and 178 days in 1987. Petitioner did not respond to the question, "How many days or part days were you physically present in New York State on non-working days such as Saturdays, Sundays, vacations or leave with pay, holidays, illness, and

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<sup>8</sup>The original Form IT-203 with attachments for 1986 was submitted during the hearing as the Division's Exhibit "H". The original Form IT-203 with attachments for 1987 was submitted as the Division's Exhibit "I".



other non-working days." He stated he maintained an apartment in New York at 1175 York Avenue, Apt. 817, New York, New York prior to 1986 through the present.

On December 21, 1989, petitioner, by his former representative, executed a consent to extend the statute of limitations for assessment of personal income taxes for tax year 1986 until April 15, 1991. The consent was executed by the Commissioner's representative on December 22, 1989.

In the spring of 1990, while the audit was still underway, petitioner hired a new representative, Mr. Richard Kandel, a certified public accountant (tr., p. 311). During the hearing, Mr. Kandel testified that petitioner gave him the business logs for 1986 and 1987 which petitioner had obtained from the company. He testified that these logs covered Mondays through Fridays. In response to the question, "Do you know who kept those logs?", Mr. Kandel responded as follows:

"Yes. I was told they were -- the secretaries in the office, I would imagine. The office personnel in the New York showroom kept this so there were several that had access to it and had kept it" (tr., p. 317).

Petitioner submitted the original 1986 and 1987 company logs as his Exhibit "70". Each year's log consists of sheets of paper which contain one work week per sheet. Each sheet in the upper left hand corner contains a box entitled "SALESPERSON" and the upper right hand corner "WEEK OF". Each work day, Monday through Friday, is listed horizontally across the page and the time, broken down in half hour increments, starting with 8:30 A.M. and ending with 4:30 P.M., is listed vertically. Each log contains notations for: petitioner's appointments in New York City; sick days; vacation days; days in New Jersey; as well as days spent "shopping the stores" inside New York and outside New York.

The 1986 log submitted into evidence is missing the week ending May 2nd. These five days were conceded as New York days (tr., p. 332).

Mr. Kandel testified that he personally made a day-by-day analysis of the logs and discussed the logs and his analysis with petitioner. Mr. Kandel testified that "[i]n certain cases, there was documentary evidence -- travel receipts -- that corresponded to the days" which he

used to validate his analysis. His analysis was put in summary form for each year (tr., pp. 318-320).

Mr. Kandel met with the Division's auditor and gave him copies of the company logs, Mr. Kandel's analysis and his summary. At a subsequent meeting, Mr. Kandel produced some American Express charge slips for the auditor's review (tr., p. 323). After further review, Mr. Kandel and the auditor agreed that three additional days should be shown to be New York days in 1986 and four in 1987, and this was noted in the summary (tr., pp. 324-325).

After making the above adjustment, Mr. Kandel and the auditor agreed that Mr. Kandel's summary was a fair and accurate summary of the appointment logs and other documents they had reviewed as far as business days were concerned. They agreed that in 1986 petitioner was in New York 160 business days and in 1987 was in New York 159 business days (tr., pp. 325-326). In the Division's Exhibit "J", on the first page of the sheet entitled "Continuation Sheet for Income Tax Report of Field/Office Audit", the auditor states:

"On the statutory [sic] residency question, the diaries were analyzed (work paper #23 & 24), 159 days were determined for year 1987 and 160 days for year 1986 as days allocated to NY and agreed to by representative. The above mentioned diaries did not account as to where the taxpayer spent Saturdays, Sundays and holidays. So these days were added to the business days allocated to NY as per the above statement making a total of days in NY for each year of more than 183 days."

The two-page summaries for 1986 and 1987 prepared by Mr. Kandel were submitted as petitioner's Exhibit "71". For 1986, the total of working days in New York is listed as 160, with 66 working days outside of New York and a total of 139 non-working days (i.e., Saturdays, Sundays, holidays, vacations and sick days). For 1987, 159 working days were in New York, 66 working days were outside New York and 140 days were non-working days.

At the conclusion of the audit, two statements of personal income tax audit changes, dated December 7, 1990, calculated additional tax, interest and penalties due for tax years 1986 and 1987.<sup>9</sup> The jurisdictions involved were New York State and City. Resident status for both

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<sup>9</sup>The statements of personal income tax audit changes for 1986 and 1987 were submitted as the Division's Exhibit "D".

jurisdictions is listed as "resident". On both statements of personal income tax audit changes, penalty under Tax Law § 685(b), deficiency due to negligence, was asserted for New York City.

On December 13, 1990, the Division received \$438,131.59 from petitioner under protest.

The Division issued a Notice of Deficiency (Notice No. L-002367462-8), dated February 15, 1991, for personal income taxes due pursuant to Article 22 of the Tax Law and the New York City Administrative Code for 1986 and 1987. In that notice, petitioner was assessed (1) a deficiency for 1986 State income tax in the amount of \$230,525.42, plus \$76,584.66 in interest; (2) a deficiency for 1986 City income tax in the amount of \$88,411.42, plus a \$19,147.34 penalty and \$29,476.36 in interest; (3) a deficiency for 1987 State income tax in the amount of \$4,772.58, plus \$1,311.99 in interest; and (4) a deficiency for 1987 City income tax in the amount of \$5,794.80, plus a \$1,114.69 penalty and \$1,593.00 in interest.

The computation section of the notice contained the following explanation: "Field audit of your records disclosed additional tax due."

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 111606), dated April 24, 1992, sustaining the statutory notice.

Petitioner timely filed a petition, dated July 15, 1992, alleging that he was not liable for the tax, interest and penalty assessed; that he was not a New York State resident for the years in question; and that the amount assessed, including penalties was incorrect.

The Division filed an answer dated September 23, 1992.

During the hearing, petitioner was asked where he spent his weekends subsequent to his purchase of the home in Wilton, Connecticut. Petitioner testified as follows:

- A. "Subsequent. I'm sorry. Afterwards. I spent all the weekends -- or I would say as many as I could in Wilton, Connecticut. I never wanted to leave there."
- Q. "What did you do there? Did you have a routine?"
- A. "I would usually come home. A lot of times on Fridays, those were days I was in New Jersey and I could get home at a reasonable hour. It was against

the commute and there usually wasn't the traffic getting from New Jersey to Wilton.

"Friday night met friends for movies, go out for dinner, sometimes go home and unwind. Saturday morning rolls around and it was usually a good day to get up, have breakfast and do errands. There is a Route 7 where most of the stores are and you would kind of try to knock them off as quick as you could. I would stop at the hardware store on Saturday mornings. I would go to the food emporium. Caldor was in the same shopping center so you could go and do that. I would go to the dry cleaners. I would go get gas for the car. I would stop off at the frame shop where I had become friendly with the couple that owned it and became good friends with them.

"In the afternoon, go for lunch. Take my girlfriend and go back to the house, have lunch there and usually stop off at the movie, the video store that was closer to the house and that was usually the last stop and then go home. That would be Saturday day. Westport Country Playhouse we went to and enjoyed going to see the shows there. We'd go to the movies. If I went to a movie on Friday night, I didn't go on Saturday night. We would make dinner at home. The picture with Laura and me, I think, is a Saturday night. I would make arrangements to see my sister Addie, who is a gourmet cook, with her husband and my nephew. We'd be going over there for dinner. I would meet my parents sometimes.

"We would see friends. There was usually an activity on Saturday night and Sunday was usually a day to unwind, unplug, do the laundry, spend time puttering around the house in the sense of doing some yard work, which I usually did, and basically it felt like a school night or day so you were always ready -- getting yourself ready for the week ahead a little bit.

"Sunday night was sometimes going to the movies, going out for dinner, watching '60 Minutes'. It would be basically getting ready mentally for the next day at work" (tr., pp. 88-91).

Petitioner averred that he usually went to the movie theaters in Westport because they had five movie theaters there. He did not go to the movies in Wilton because there was one screen "and usually they had six or eight weeks of the Walt Disney movies" (tr., p. 91). He stated he sometimes went to the movies in Greenwich if he went to see his parents.

Petitioner testified that he ate out at restaurants quite a bit. When asked where the restaurants were located, he responded that the restaurants for the most part were in Westport, Connecticut. He further stated that he went to a couple in New Canaan and a few in Greenwich (tr., p. 91).

When asked who accompanied him to the restaurants, petitioner responded:

"[W]ith Peter. Would go with just Laura. Would go with Mark Wagy. He's the gentleman, and his wife, that owned the frame shop. And Addie liked to cook so

most times we didn't go out. If it was my family, it was a special occasion. If I went with my parents, it was always a restaurant and sometimes Laura and I would just go the two of us" (tr., p. 92).

Petitioner testified that when he ate at restaurants, he usually paid cash (tr., p. 93).

Petitioner described a typical week in 1986 and 1987 as follows:

- A. "In 1986 let's start with Monday morning. Most Mondays I would go into New York. It was a good day to call the stores. You could find out -- calling the stores on Monday was almost like getting a report card. You found out how you were doing and became friendly with the stores.

"If you had sold ten percent, you would probably be talking to the stores about them reordering, placing more. You were glad to kind of plug into the stores on Monday. You would get their travel schedule. The buyers were, many times, going over what opportunity to buy they had, dollars they had to spend and you made an effort to speak to the stores so it was usually a good day to be in the City.

"A typical week would be one to two days, three days in New York setting appointments. If I -- the beginning portions of the months sometimes -- the store buyers regularly or always came in. You couldn't -- they all had their own schedules. You'd try to schedule time to shop a store. Two or three days in the City for that and usually saved Friday to probably go to Jersey.

"Most times if I was going to spend a lot of time with John, I would try to do it toward the back end of the week, usually Thursday-Friday. And then weekends I was not around the office."

\* \* \*

- Q. "During 1986 and 1987, where did you spend your weekends?"

- A. "I was in my home in Connecticut."

- Q. "Did you make plans to come into New York on weekends?"

- A. "No."

- Q. "Why not?"

- A. "I didn't like it. Connecticut was a way I could unplug the tension of what the week was. It was a routine that I enjoyed. I was glad to go play house with my girlfriend and I had made some friends. I had family there. I didn't want to be in New York City."

\* \* \*

- Q. "If you were sick, where were you?"

- A. "If I was very sick, I was home in bed" (tr., pp. 134-136).

Petitioner submitted the affidavit of his sister, Addie R. Powell, as Exhibit "67". In her

affidavit, Mrs. Powell stated that she has resided in New Canaan for over 20 years, and she knows that one of the reasons that her brother moved to Wilton was to be near her and her family. She stated that since 1981 her brother has visited with her and her family every four or five weeks. She usually cooked because her brother likes her cooking and it was convenient. She further stated that "we celebrate virtually every Thanksgiving and Christmas and other special occasions at our home, and our parents are usually in attendance." Mrs. Powell spoke to her brother by telephone at least once every other week, when she called him in Connecticut, or he called her from his Connecticut home. She affirmed that she never tried to reach her brother in New York on weekends, as she knows he is never there. "He is always in Connecticut, or else travelling somewhere in the United States or abroad."

Petitioner's Exhibit "68" is the affidavit of Mark Wagy, a friend of petitioner. Mr. Wagy states:

"2. I met Andy in 1982 when I owned and ran a framing shop named 'Gateway Gallery', located on Danbury Road, in Wilton, Connecticut. Andy and I became and remained close friends until 1990 when I moved away.

"3. During this period, I would estimate that I saw Andy at least every other weekend. Initially, I saw him in connection with visits he made to my Gallery to purchase frames or have items framed. Later, in addition to such visits, we began to eat out together or at his home and we frequented the local movie theatres and rented and watched movies at his home on his large screen television.

"4. Whenever I called Andy in Connecticut on the weekend, I could always reach him, because he was virtually always there."

Petitioner submitted the affidavit of Dr. James J. McSweeney, his next door neighbor, as his Exhibit "69". Dr. McSweeney stated that he resided at 26 Chicken Street, Wilton, Connecticut and had shared a common driveway with petitioner. He stated that his home was situated slightly above petitioner's. He was, therefore, in a position to see both petitioner's home and garage and to generally know when petitioner was around. He also stated that his dogs consistently barked as petitioner drove and/or walked in and out of his driveway.

Although Dr. McSweeney was away from his home sometimes on weekends, he affirmed that, to the best of his recollection, petitioner was present at his Connecticut home almost every weekend (Friday night through Monday morning) during 1986 and 1987 and also during the

entire period he was his neighbor. He stated that petitioner was friendly with him and his wife, they chatted when they met and socialized on occasions, and he knew that petitioner "always considered himself a Connecticut resident and spent as much time in Connecticut as he could."

During the hearing, Mr. Kandel testified that the auditor needed verification of petitioner's whereabouts on weekends and holidays. He testified that the auditor suggested telephone bills to prove presence in Connecticut on a particular day.

Mr. Kandel stated that petitioner saved only the face sheets of his telephone bills, which showed the amount due and had notations of the date paid and check number only; and he threw the rest away. He averred that an attempt was made to get the backup documents from the telephone company. However, the telephone company informed them that records were not saved going back that far and it could not produce any detail of the records. Mr. Kandel testified that he informed the auditors of this, but also stated to them that he would try to produce receipts for other things that petitioner had done in Connecticut and prepare a log, accounting for days "with the receipts of some activity in Connecticut" (tr., pp. 327-329).

Mr. Kandel testified that petitioner was able to furnish him with receipts for weekend activities. He testified that after obtaining the receipts, he "organized them in a fashion where somebody could easily review them and make the determinations that I represented" (tr., pp. 329-330). Mr. Kandel testified that he prepared two manila folders: the first is labeled "1986 - Diary, weekend receipts"; and the second is labeled "1987 - Diary, weekend receipts". These two folders contain receipts and sheets of paper with analysis of the receipts. Mr. Kandel described the general nature of the receipts as follows:

"Well, we have a combination of the main receipts that I have here are -- I've got home repair bills, gasoline receipts. I've got movie rental receipts. I've got exterminator visits where the exterminator came over during the weekend once a month. I have a few restaurant receipts. I have some of the trips that he made when it overlapped on the weekend. I've got store receipts.

\* \* \*

"I have a letter from the exterminator which outlines his dates of visits in '86, '87 which were either a Saturday or a Sunday" (tr., pp. 330-331).

Mr. Kandel testified that the receipts covered almost every weekend day during the audit period.

The two manila folders of weekend receipts for 1986 and 1987 were submitted in evidence as petitioner's Exhibit "72".

Petitioner's Exhibit "72" includes, inter alia, receipts for: gasoline purchases; meals at restaurants; hotel bills; airplane tickets; and the purchase of services or repairs. The majority of the gasoline receipts are cash receipts and as such do not identify who made the purchase. However, one gasoline receipt, dated March 1, 1986, from Exxon, 1 West Putnam Avenue, Greenwich, Connecticut, was a charge slip. The purchaser of the gasoline on that date was Crazy Horse, Inc.<sup>10</sup> The restaurant receipts submitted are all cash receipts. There are a few receipts for services and repairs with petitioner's name on them. Some receipts for purchases are cash receipts and do not identify who made the purchase. There are a number of airline ticket receipts; however, some are torn and difficult to read. A number of hotel receipts were submitted. One receipt, for an overnight stay in Boston at The Copley Plaza on September 20, 1986 through September 21, 1986, is in the name of D. S. Reed, UV of Alabama, 303 Bethune Way, Huntsville, Alabama.

Petitioner submitted 67 proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into the Findings of Fact herein except: numbers 13, 16, 17, 24, 40, 44, 45, 46 and 47, which are not supported by the record; numbers 11, 14 and 39, which were modified to more accurately reflect the record; numbers 18, 19, 25, 26, 27, 29, 30, 34, 37, 41, 42, 58, 62, 66 and 67, which are conclusory in nature; and numbers 51, 52, 53 and 59, which are irrelevant.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts he was not a domiciliary of New York State during 1986 or 1987. He contends he abandoned his New York domicile in 1981 when he purchased a home at 28 Chicken Street, Wilton, Connecticut. He avers that he chose to settle down in Connecticut because he had grown up in Westchester County, he was close to his family, and his parents and

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<sup>10</sup>Petitioner testified that his father worked at Crazy Horse, Inc. (tr., p. 265).



his

sister, Addie R. Powell, now lived in Greenwich, Connecticut and New Canaan, Connecticut, respectively. He contends he was also within commuting distance to his company's New York City office and its New Jersey office. Petitioner argues that he spent approximately \$100,000.00 on renovations, furnishings, landscaping and general amenities to make the Chicken Street property his permanent home. He did this, he asserts, five years before the audit period began in 1986. He maintains that he continuously resided at the Chicken Street home until 1991, when he sold it and purchased a new home in Greenwich, Connecticut.

Petitioner argues that he maintained the New York City York Avenue apartment for investment purposes only after 1981. He asserts that it was a small, minimally furnished apartment which did not contain any of his personal belongings and was used constantly by friends and associates. He maintains he would have sublet it during the audit period; however, if he had done so he would have forfeited his right to purchase the apartment at an insider price. He maintains that after he purchased the apartment he immediately sublet it for two years; at the end of the sublease he offered it for sale and subsequently sold it to the first person who made an offer.

Petitioner contends that "he has amply met his burden of proving his change of domicile to Connecticut by 'clear and convincing evidence'" (Petitioner's brief, p. 24). He asserts that the facts unequivocally show that he established a new domicile for himself in April 1981, which has continued to this day.

Petitioner maintains he was not a statutory resident of New York during the years 1986 and 1987. He contends that he was in New York 160 days in 1986 and 159 days in 1987. He avers that the appointment log; the receipts with respect to weekend days; his testimony; the testimony of his accountant, Mr. Kandel; the testimony of his friend, Peter Mazza; as well as the affidavits of his sister, Addie R. Powell, his friend, Mark Wagy, and his next door neighbor, Dr. James J. McSweeney, support his day count.

Lastly, he asserts that penalties should not be assessed for either 1986 or 1987. He contends that the only basis for assessing penalties in this matter is that, on his 1986 and 1987 New York nonresident income tax returns, he "did not indicate that he maintained 'an apartment or other living quarters' in New York" (Petitioner's brief, p. 26). Petitioner asserts that his tax returns "were prepared by his accountant, on whom he relied" (Petitioner's brief, p. 26). He argues that he:

"cursorily reviewed his returns prior to signing them, and either did not notice this question or, if he did, did not consider that he maintained living quarters in New York, since his home was in Connecticut, and for all intents and purposes he had abandoned the apartment to his friends and business associates and considered it nothing more than an investment" (Petitioner's brief, p. 26).

He avers that penalties are not warranted because he justifiably relied upon and did not question his accountants. He also contends that, at all times, he filed New York returns, contrary to the State's contention.

The Division contends that petitioner was a domiciliary of the State of New York during 1986 and 1987. It asserts that the burden of proof is upon petitioner to come forward with evidence that clearly establishes a change of domicile. The Division maintains that "the petitioner has not come forward with evidence that clearly and convincingly shows the severing of long time ties with New York and abandonment of a New York domicile for a new domicile in Connecticut" (Division's brief, p. 7). The Division further asserts that:

"petitioner has not demonstrated through clear and convincing evidence that his New York City domicile was abandoned in 1981, and that during the audit period, the petitioner continued to demonstrate an intent to treat New York as his domicile" (Division's brief, p. 9).

Furthermore, the Division argues that:

"the finder of fact should carefully consider not only the ties that an individual has with a new locality but also the extent to which ties are severed with the domicile alleged to be abandoned" (Division's brief, p. 13).

It contends that the evidence in the record shows far greater ties to New York City than to the State of Connecticut.

The Division questions the credibility of petitioner in this matter. The Division contends that petitioner failed to file New York tax returns from 1972 to 1975 and failed to file proper

resident tax returns from 1976 to 1981. In addition, it contends that petitioner made material misrepresentations on the nonresident tax returns he filed with New York for 1986 and 1987. On both his 1986 and 1987 Form IT-203's, petitioner stated that he did not maintain a permanent place of abode in New York City. The Division maintains that "this was untrue as he in fact maintained two places in New York City during 1986 and 1987" (Division's brief, p. 15).

The Division contends that petitioner was a statutory resident of New York in 1986 and 1987. Citing relevant case law, it asserts that:

"it was incumbent upon the petitioner, as an individual maintaining a permanent place of abode in New York City but claiming to be a non-resident, to keep and have available to the Division of Taxation adequate records to substantiate that he did not spend more than 183 days of the 1986 and 1987 taxable years within New York City and State" (Division's brief, pp. 15-16).

It contends that petitioner has not provided adequate records to show that he spent 183 days or less in New York during the years in question. The Division argues that petitioner did not submit a diary of his travels into the record to substantiate his location. The Division notes that "petitioner himself never testified as to the accuracy" of the appointment log (Division's brief, p. 17). It also notes that the preparer or preparers of the appointment log did not testify as to the accuracy of these documents. The Division also contends that the receipts with respect to weekend days should be given very little weight "as the taxpayer himself failed to testify or otherwise qualify these receipts as his own" (Division's brief, pp. 17-18). It argues that the majority of these receipts contain "no name, signature or address, thus making it difficult to associate them with any one individual" (Division's brief, p. 17).

Lastly, the Division asserts that the penalties were properly assessed. It contends that petitioner has failed to put forth any evidence or testimony to establish reasonable cause for the waiver of penalties assessed in the Notice of Deficiency.

#### CONCLUSIONS OF LAW

A. For the year at issue, Tax Law § 605(former [a]) provided, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

"(1) who is domiciled in this state, unless (A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state or . . . .

\* \* \*

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . . ."

B. Former section T46-105.0(a) of the Administrative Code of the City of New York provided a virtually identical definition of a New York City resident individual for purposes of the City income tax.

C. The Tax Law does not contain a definition of "domicile", but the Division's regulations (20 NYCRR former 102.2[d]) provided, in pertinent part, as follows:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

\* \* \*

"(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

D. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433

NYS2d 276). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile . . . . There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention . . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animus revertendi . . . .

"This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

E. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne, 181 Misc 238, 246, 41 NYS2d 336, 343, affd 293 NY 785; see, Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138, 140). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990). The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra) it stated, "No pretense or deception can be

practiced, for the intention must be honest, the action genuine and the evidence to establish both clear and convincing." Additionally, formal declarations of domicile or principal residence are generally less persuasive in establishing intent than one's "general habit of life" (see, Matter of Trowbridge's Estate, 266 NY 283).

F. The Division contends that petitioner has not demonstrated through clear and convincing evidence that he severed long-time ties with New York and abandoned his New York domicile in 1981 for a new domicile in Connecticut. It asserts that petitioner was a long-time resident and domiciliary of New York State and City and has maintained a permanent place of abode in New York City from 1972 until the present. The Division maintains that, during the years in question, petitioner in fact maintained two abodes in New York City.

The Division also contends that it is significant that petitioner continued his long-time business ties with New York City. The Division asserts that petitioner's main business activity has been the company which he co-founded in 1975, owned until 1986 and was continuously employed by through the early 1990's. It argues that petitioner was president of the company and maintained an office in New York City during the years in question. Furthermore, the Division asserts that petitioner did not maintain any business ties with Connecticut during the years in question.

The Division contends that petitioner maintained many other ties to New York State and City which indicate he did not intend to abandon his domicile there. The Division asserts the following contacts support New York domicile: (1) he continued receiving mail at both New York City residences, as well as personal mail at his office; (2) he maintained a bank account for each residence in New York, with the respective addresses thereon; (3) maintained a safe deposit box in New York City; (4) dated two women during the audit period who both lived and worked in New York City; (5) was a member of a New York City athletic club; (6) maintained cable television at his New York City apartment; and (7) regularly visited doctors in Manhattan. Furthermore, the Division argues that petitioner, during each of the years 1986 and 1987, "had a presence in New York for an equivalent of more than five months."

Petitioner has proven by clear and convincing evidence that he changed his domicile from New York to Connecticut prior to the years in question (see, Matter of Bodfish v. Gallman, supra).

Petitioner was a long-time resident and domiciliary of New York State and City. He was born in White Plains, New York and raised in Harrison, New York, where his parents resided. At age 16 he attended prep school in Winchester. Subsequently, he attended and graduated from the University of Arizona in 1972. In the fall of 1972, he returned to New York City where he obtained both employment and an apartment. Petitioner was employed in New York City by clothing manufacturers from 1972 until 1975, when he co-founded the company, a New York-based outerwear manufacturing corporation, along with two other individuals.

Petitioner had a succession of apartments until 1978, at which time he rented the York Avenue apartment (see, Finding of Fact "12"). He continuously rented this apartment from 1978 until 1989 when he purchased it. He testified that he considered himself a New York domiciliary until 1981 when he purchased the Chicken Street house in Connecticut (see, Finding of Fact "22"). In 1986, petitioner purchased the East 75th Street, New York City apartment from his mother. Throughout 1986, there was no furniture in the apartment and, although it was vacant, it was habitable. In February or March 1987, petitioner began extensive renovations of the East 75th Street apartment which were completed by the end of 1987. During the renovation period, the apartment was uninhabitable (see, Finding of Fact "45").

The Division argues that petitioner's continuous maintenance of a permanent place of abode in New York City since 1972 and the maintenance of two places of abode in New York City during the audit period is not consistent with his asserted change of domicile. I disagree. While ownership of real property in New York City and continued maintenance of a New York City apartment are indications that there was not an intent to change domicile, these are only two factors that need to be considered (see, Matter of Chrisman, 43 AD2d 771, 350 NYS2d 468; Matter of Roth, Tax Appeals Tribunal, March 2, 1989; Matter of Cooper v. State Tax Commn., 82 AD2d 950, 441 NYS2d 30). The retention of a dwelling in New York does not

conclusively determine a lack of intent to change domicile (see, Matter of Angelico, Tax Appeals Tribunal, March 31, 1994; Matter of Doman, Tax Appeals Tribunal, April 9, 1992; Matter of Sutton, Tax Appeals Tribunal, October 11, 1990). Where a person has three homes, as petitioner did, his domicile is the one which he considers and uses as his permanent home, and the length of time spent at each location is an important factor in determining intention in this regard (20 NYCRR former 102.2[d]).

It is clear from the record that petitioner considered the Chicken Street property his permanent home. He purchased the Chicken Street property in April 1981 for \$218,500.00. This home contained approximately 3,500 to 3,800 square feet on two wooded acres. Shortly after petitioner purchased the Chicken Street property in 1981, he hired, at a cost of \$833.00, professional movers to move what he termed his personal belongings -- his clothes, books and tapes, toiletries, kitchen items and food stuffs -- to the Chicken Street property. He left a few pieces of furniture in the York Avenue apartment which he considered inconsequential. He testified in great detail about the Chicken Street property and the steps he took to make it "his home". It is evident from the record that he spent a great deal of money on furniture, improvements and landscaping for the Chicken Street property (see, Findings of Fact "15" through "18"). Petitioner testified that his Chicken Street home was about 50 miles from New York City and the commute to New York City took about one hour and 15 minutes (see, Finding of Fact "33"). Both petitioner and Peter Mazza offered testimony that they commuted together twice a week throughout 1986 and the first half of 1987 and once a week through the remainder of 1987. I found Mr. Mazza to be a very credible witness who verified petitioner's testimony.

It is clear from the record that, at the time he purchased the Chicken Street property, petitioner was only renting the York Avenue apartment, a standard one bedroom of approximately 700 square feet (see, Finding of Fact "13"). Petitioner testified that he retained the York Avenue apartment in order to obtain an insider price when it was offered for sale. He purchased the apartment in 1989 when it was finally offered for sale. In 1984, his sister took a



number of pieces of the remaining furniture from the apartment when he decided to sublet it. Shortly thereafter, petitioner discovered that he could not sublet the apartment and still be able to get an insider price when he purchased the apartment. He went out and furnished it with floor samples because he could not sublet it and his friends were asking to use it (see, Findings of Fact "37" and "38").

As for the East 75th Street apartment, he purchased it in 1986 from his mother. This apartment was much larger than the York Avenue apartment. He testified that it remained vacant and unfurnished during 1986. It is clear from the record that the apartment was inhabitable during 1986 and uninhabitable throughout much of 1987 while renovations took place. However, there is no evidence in the record that petitioner stayed at this apartment.

Based upon a review of the record, petitioner's ownership of the East 75th Street apartment, as well as the maintenance of the York Avenue apartment are diminished in importance in the determination of domicile.

The Division asserts that petitioner's long-time business ties with New York City contradict his claimed intent to change his domicile. This may be an important factor in determining intent (see, Matter of Zinn v. Tully, supra; Matter of Kartiganer, Tax Appeals Tribunal, October 17, 1991, confirmed 194 AD2d 879, 599 NYS2d 312; Matter of Clute v. Chu, 106 AD2d 841, 484 NYS2d 239; Matter of Roth, supra), but as with the retention of the New York home, it is just one factor to be considered within the totality of the circumstances (see, Matter of Angelico, supra).

The Division's reliance on Matter of Kartiganer (supra) is misplaced. The facts in the instant case are quite different from those in Kartiganer. Mr. Kartiganer, who had purchased a condominium in Boca Raton, Florida in March 1981, was phasing out his involvement with his Orange County consulting engineer business during the audit period. Petitioner is a young man who was not contemplating retirement, rather he was embarking on his career. He testified at great length about the long hours he and his partner, John Pollack, spent building the company, an outerwear manufacturing company with offices in New York City and New Jersey. He and

his partners built a company which grew and became profitable over the years. Although he and his partners were not actively seeking to sell their business, in May 1986 they did sell it to XCOR, a publicly-traded corporation. Petitioner had been president of the company since its founding and continued in that position during the audit period, even after the company was sold. After the sale, XCOR continued to employ petitioner under an employment contract.

I do not believe that petitioner's continued business ties with New York City negate his intent to establish a Connecticut domicile. The company's success enabled him to purchase the Chicken Street property. Furthermore, if I was to accept the Division's argument, every individual who has been a New York domiciliary, is employed in New York City and is financially able to purchase a home within commuting distance of the City in the neighboring states of New Jersey and Connecticut would never be able to establish a new domicile.

Petitioner testified at great length about his "general habit of life" prior to 1986 and 1987. The record reveals that petitioner's pattern of living changed in 1981 when he purchased the Chicken Street property. I found petitioner's testimony about his "general habit of life" to be credible. His testimony supports his asserted change of domicile.

It is noted that numerous factors tend to show that petitioner did not change his domicile from New York. These factors include: petitioner's maintenance of checking and savings accounts and a safe deposit box in a New York bank; petitioner's use of New York professionals; petitioner's use of his New York address on investments; petitioner's membership in a New York athletic club; and his receipt of mail at both New York City apartments, as well as the personal mail at his office. However, there are numerous factors which tend to show that petitioner did change his domicile to Connecticut. These factors include: petitioner's savings account and mortgage on his Chicken Street home with a Connecticut bank; petitioner's use of the Chicken Street address on company documents and new investments; his possession of a Connecticut driver's license; his Connecticut voter registration; his use of Connecticut repair people; and his patronage of Connecticut establishments.

Upon review of the entire record, I find that petitioner did change his domicile from New

York (State and City) to Connecticut.

G. Although it has been determined that petitioner changed his domicile from New York to Connecticut, he would be properly assessed herein if he both maintained a permanent place of abode in New York (State and City) and spent in the aggregate more than 183 days there during the audit period (Tax Law § 605[former (a)(2)]).

Petitioner and the Division agree that the York Avenue apartment was maintained by petitioner as a permanent place of abode.

The remaining issue is whether petitioner spent in the aggregate more than 183 days of the taxable year in New York (State and City). Petitioner has the burden of proving by clear and convincing evidence that he did not spend more than 183 days in New York (State and City) during the years in issue (Matter of Smith v. State Tax Commn., 68 AD2d 993, 414 NYS2d 803; Matter of Kornblum v. Tax Appeals Tribunal, 194 AD2d 882, 599 NYS2d 158; see also, 20 NYCRR former 102.2[c]). I find that petitioner has failed to sustain his burden.

Petitioner was under the obligation to maintain "adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State" (20 NYCRR former 102.2[c]). The Tax Appeals Tribunal, in Matter of Moss (November 25, 1992), found that a diary, which was supported by detailed and consistent testimony and travel reports, complied with the requirement set forth in 20 NYCRR former 102.2(c). The company log was submitted into the record during Mr. Kandel's testimony on behalf of petitioner. The record also contains two summary sheets with the New York day counts for petitioner for 1986 and 1987, respectively, which were prepared by Mr. Kandel based on his review of the 1986 and 1987 company logs, his discussions with petitioner and review of supporting travel documents where available (see, Findings of Fact "53 through "55"). As part of petitioner's Exhibit "72", various "weekend receipts" for the years 1986 and 1987 were submitted into evidence. Petitioner did not submit a personal diary or any travel or expense reports into the record.

In the instant case, the company log submitted into the record contains entries for Monday

through Friday only. The entries in each log were made by various individuals resulting in the legibility of some of the entries varying from good to poor. There are notations concerning petitioner's whereabouts generally for each workday. The notations concerning petitioner's business travel basically consist of "Andy out" and a location, such as "West Coast", and an occasional business appointment. There are no notations of airline flight numbers, departure or arrival times or hotel accommodations. The notations for either sick days or vacation days consist mainly of "Andy out (sick)" or "vacation" (see, Finding of Fact "54").

Petitioner offered no testimony about the accuracy of the company logs; in fact, he offered no testimony at all about the logs. He testified generally as to what a typical week in 1986 and 1987 would be like. He did not testify about where he spent his vacations. He offered no testimony about his business trips, so there is no way of knowing whether he returned from trips early enough to return to the New York City office or so late at night that he stayed at the York Avenue apartment. Absent from the record are any corroborating travel or expense reports which would support the company logs. Absent also is testimony by the various preparers of the company logs.

Petitioner's Exhibit "72" consists, in part, of various "weekend receipts" for the years 1986 and 1987. Petitioner offered no testimony about these various receipts, the majority of which consist of cash receipts for gasoline purchases and meals at various restaurants. I do not give these receipts much weight because it is impossible to determine who purchased the goods or services. In addition, two receipts bear names of either an individual or an entity other than petitioner or the company (see, Finding of Fact "72").

Based on the record before me, I am unable to determine how many days petitioner spent in New York (State and City) during the years in issue. Petitioner has failed to meet his burden of proof on this issue (Tax Law § 689[e]).

H. Petitioner contends that no penalties are warranted because he "justifiably relied on and did not question his accountants, as he has done throughout his life." Petitioner also asserts he has "at all times filed New York returns, contrary to the State's contention."

The Division contends that petitioner has failed to put forth any evidence or testimony to establish reasonable cause for the waiver of penalties assessed in the Notice of Deficiency. It also argues that "petitioner's contention that any failure to properly prepare his tax returns were based on the reliance of his accountant" is a post-hearing allegation of fact which should not be considered since the record is closed in this matter. Furthermore, the Division asserts that petitioner had a legal responsibility and obligation to file accurate tax returns and, therefore, "any reliance on his accountant, if true, would be at his own peril." The Division maintains that the misrepresentations on the 1986 and 1987 tax returns are not an isolated instance. It avers that petitioner has a history of failing to file correct tax returns which extends over approximately a 10-year period.

Petitioner bears the burden of proving that the deficiency was not due to negligence (Tax Law §§ 685[b], 689[e]). Petitioner has not sustained his burden of proof. The York Avenue apartment is a permanent place of abode within the meaning of 20 NYCRR former 102.2(e)(1). Petitioner, at the beginning of the audit, in response to an audit questionnaire, stated that he maintained the York Avenue apartment as a permanent place of abode prior to 1986 (see, Finding of Fact "51"). Petitioner has failed to sufficiently explain why he did not reveal his maintenance of the York Avenue apartment on his 1986 and 1987 tax returns when he maintained the apartment prior to 1986.

Based on my review of the record, the Division is correct that petitioner has a history of failing to file correct returns.

The Division properly assessed the negligence penalty.

I. The petition of Andrew M. Reid is denied and the Notice of Deficiency (L-002367462-8) dated February 15, 1991 is sustained.

DATED: Troy, New York  
December 27, 1994

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE